



November 26, 2002

Ms. Lavergne Schwender
Assistant County Attorney
Harris County
1019 Congress Street, 15th Floor
Houston, Texas 77002-1700

OR2002-6789

Dear Ms. Schwender:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 171981.

The Harris County Purchasing Department (the "department"), which you represent, received two requests for information relating to vendor responses to job number 01/0318. Specifically, one of the requestors seeks the "pricing/delivery" schedule, references, and project schedule/milestones for each vendor as well as, "any Public Information Requests received for this job." The other requestor seeks the final tabulations of all vendors who submitted proposals.¹ Although you do not raise any exceptions to disclosure on behalf of the department, you state that the release of the requested information may implicate the proprietary interests of the third-party vendors. Pursuant to section 552.305 of the Government Code, you have notified the affected third parties of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act (the "Act") in certain circumstances). You state that only Easy Access, Inc. ("EZ Access") and Election Systems & Software ("ES&S") objected to the release of their information. Thus, we presume that the department has released the remaining responsive information; if not, you must do so at this time. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that Gov't Code § 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under circumstances).

¹Although you did not submit the final tabulations for our review, you indicate that the tabulations contain the same proprietary information that is at issue in the first request.

Initially, we note that both companies submitted arguments for information that is not responsive to the requests. This ruling only addresses the public availability of those portions of the proposals that were submitted and contain the companies' "pricing/delivery" schedules, references, and project schedule/milestones. Specifically, we find that the following sections of EZ Access' proposal contain responsive information: the timeline in section 6, section 11, and section 15. We also find that the following portions of ES&S' proposal are responsive to the request: responses to questions 2 and 9, pages 31-34, pages 50-52, and Exhibits A and B1. The remaining portions of the proposals are non-responsive and will not be addressed in this ruling.

EZ Access and ES&S claim that the portions of their proposals at issue are protected from disclosure under section 552.110. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110. Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees.... A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

Restatement of Torts §757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

(1) the extent to which the information is known outside of [the company's] business;

- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts §757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

After reviewing the arguments submitted by EZ Access and ES&S, we conclude that, in this instance, both companies have demonstrated that their customer lists and pricing information are confidential proprietary information. *But see* Open Records Decision Nos. 514 (1988) (questioning whether pricing information or other general terms of contract with state agency could ever constitute trade secret), 494 (1988) (application of commercial or financial information prong of Gov't Code § 552.110 requires balancing of public interest in disclosure with competitive injury to company in question). Thus, the department must withhold the following information under section 552.110: sections 11 and 15 of EZ Access' proposal; the response to question 2, pages 50-52, and Exhibit A of ES&S' proposal. We note, however, that neither company has demonstrated that their proposed timelines for this project are protected by section 552.110. *See* Restatement of Torts §757 cmt. b (1939) (defining "trade secret" as "process or device for continuous use in operation of business,"

not information relating exclusively to *particular* circumstance); *see also* Open Records Decision No. 509 at 5 (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of this information might give competitor unfair advantage on future contracts was entirely too speculative). Thus, the department must release the following information: the timeline in section 6 of EZ Access' proposal; the response to question 9, pages 31-34, and Exhibit B1 of ES&S' proposal.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

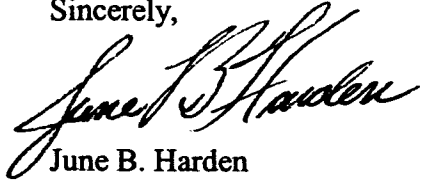
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, *no writ*).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/seg

Ref: ID# 171981

Enc. Marked documents

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